

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

74-1327

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 74-1327

THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

BENJAMIN MALLAH, VINCENT FACELLI, JR.,
ALFRED CATINO and BARNY BARRETT,

Defendants-Appellants.

**PETITION FOR REHEARING AND
HEARING IN BANC**

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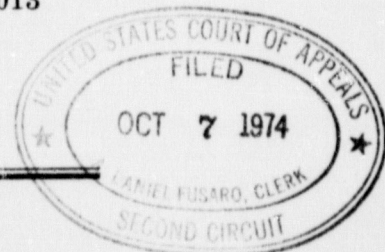


TABLE OF CONTENTS

	Page
Petition for Rehearing and Hearing <u>In Banc</u>	1
Appellant Mallah's Motion For Stay of Mandate	7
Affidavit of Counsel In Support of Motion	7

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Defendants-Appellants, BENJAMIN MALLAH and ALFRED CATINO, respectfully petition this Court to re-open and re-hear that portion of their case which held that the Trial Court did not err in precluding the introduction of extrinsic evidence to show an 'accomplice-witness' attempt to omit testimony in return for payment from an indicted co-conspirator. UNITED STATES v. MALLAH, et al., --- F.2d --- (September 23rd, 1974) sl.op. p. 475. It is further requested that this

Court grant a hearing in banc on this issue.

The instant Petition is supported by Appellants' contention that the panel, in affirming the convictions below, misapprehended several significant questions of fact which are of critical importance to the argument urged on appeal. FEDERAL RULES OF APPELLATE PROCEDURE, RULE 40(a). The alleged errors of fact are as follows:

1. One of the Appellant MALLAH's principal attacks on appeal was that his counsel was unfairly limited in introducing evidence of the accomplice-witness Joseph Conforti's attempt to extort money from Sam Kaplan, a previously named co-conspirator. On cross-examination, Conforti defended the extortive phone call to Kaplan by alleging that he had merely acted as a conduit for another co-conspirator, Jack Spada. (T 779 - 780)

2. In this regard, the Appellants' unsuccessfully attempted to introduce the actual recording of the Conforti-Kaplan phone conversation in addition to extrinsic proof that Spada was dead when Conforti conveniently identified him as the actual plaintiff in the extortion attempt. Sl.op. p.5480

3. This Court, in holding that the Trial Court did not err in excluding this evidence, relied in part upon the obser-

vation that "the evidence concerning the date of Spada's death would have been protracted" and, therefore, "might well have distracted the jury." Sl.op. p.5480 This observation, it is respectfully submitted, is inconsistent with the record.

4. It is clear from colloquy between Court and counsel that the date of Spada's death could easily have been established either through stipulation or through introduction of a single document, an autopsy report that had been produced to the Court by the Government. (T 1319 - 1320) As suggested by counsel, it could have then been established by the introduction of a document and the testimony of a single witness that Spada had been dead when the extortion attempt was initiated. The evidence, therefore, certainly would not have been "protracted". In addition to demonstrating conclusively that Conforti had singularly engineered the extortion plot, it would necessarily have shown that Confort lied under an oath taken in the presence of the jury by opportunistically blaming a dead man for his own unsavory deed. Nothing, it is submitted, could have been more clearly relevant to the jury's determination of Conforti's credibility. In ruling that the evidence at bar was sufficient to find that MALLAH was a member of the conspiracy, this Court drew specific reference

to an allegedly key piece of evidence elicited through Conforti's testimony. Sl.op p.5478 Evidence such as that sought to be introduced by the Appellants, therefore, which would affect the integrity of that testimony, should have been more liberally viewed.

5. Moreover, it should be noted that in this Court's opinion, Sam Kaplan was regarded merely as a defendant in another criminal case. In considering the tape recording and the proof of death as inadmissible extrinsic evidence of Conforti's bad character, this Court stated that:

"The extortion scheme was directed against Sam Kaplan, not against any of the defendants in this case."
Sl.op p.5480

In this Petition, Appellants seek to re-emphasize the fact that Kaplan was alleged to have been MALLAH's co-conspirator when the original Sperling Indictment was handed up. This, then, was not simply "extrinsic evidence of Conforti's bad character" but rather an attempt to "fabricate a case against a defendant" in essentially the same criminal prosecution.

UNITED STATES v. KINNARD, 465 F.2d 566 (D.C. Cir., 1972);

UNITED STATES v. HAGGETT, 438 F.2d 396 (2nd Cir., 1971).

6. Finally, in speaking to the issue of the extortion plot, this Court erroneously noted that Conforti never carried

out his threat to implicate Kaplan in a narcotics transaction and, as a result, Kaplan was acquitted. Sl.op. p.5479 Kaplan, of course, was acquitted at the end of the Government's case in the Sperling trial which took place in July of 1973. The extortion attempt, however, was made in a phone call in October of 1973. This would indicate, therefore, that Conforti was still plotting to "arrange" his testimony even after he had once testified to various aspects of the narcotics conspiracy.

7. The Petitioners most respectfully request that the admissibility of this crucial evidence be considered by this Court in banc. The question of whether the Appellants were unfairly limited in both cross-examination and the presentation of the defense case is fundamentally important to the proper management of criminal cases in this Circuit.

WHEREFORE, Petitioners respectfully suggest that these issues be heard by this Court in banc or that, in the alternative, this Court grant the Petitioners a rehearing of their appeal on this issue and that this Court grant such

other and further relief as may seem just and proper under
all the circumstances.

Respectfully submitted,

LA ROSSA, SHARGEL & FISCHETTI
Attorney for Defendant-Appellant
BENJAMIN MALLAH

NANCY ROSNER
Attorney for Defendant-Appellant
ALFRED CATINO

GERALD L. SHARGEL
Of Counsel

APPELLANT MALLAH'S MOTION FOR STAY OF
MANDATE

Appellant, BENJAMIN MALLAH, respectfully moves this Court pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure for a stay of the mandate pending application to the United States Supreme Court for a writ of certiorari in the event that this application for rehearing is denied.

Yours, etc.

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant-Appellant
BENJAMIN MALLAH

AFFIDAVIT OF COUNSEL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

GERALD L. SHARGEL, being duly sworn, deposes and says:

1. That he is an attorney duly admitted to practice in the United States Court of Appeals for the Second Circuit.
2. That he is the attorney for the Appellant, BENJAMIN MALLAH, and is fully familiar with the facts and circumstances herein.
3. That this affidavit is submitted in support of Appellant BENJAMIN MALLAH's Motion for a stay of the mandate

pending timely application to the United States Supreme Court for a writ of certiorari in the event that the accompanying Petition for rehearing and hearing in banc is denied.

4. As a result of the conviction in this case, the Appellant MALLAH was sentenced to a prison term of ten years. During the pendency of this action, the Appellant has remained at liberty on \$100,000 surety bond. This bail was set after the Appellant demonstrated to the District Court that he had an established residence in New York City and, additionally, that he had roots and family ties in New York. During the entire course of the prosecution, the Appellant MALLAH has, without exception, respected the process of both the Court and the United States Attorneys office. Your deponent has remained in frequent contact with the Appellant and has observed nothing to indicate that the Appellant has any different view toward his responsibility.

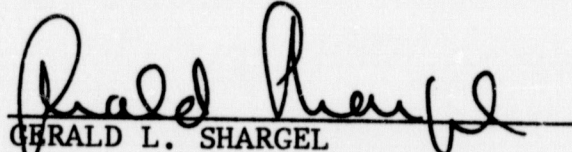
5. It is further believed that a Petition for a writ of certiorari in the United States Supreme Court would contain meritorious issues appropriate for Supreme Court review. In effect, Appellants in this Court argue that they were limited in impeaching the testimony of two key accomplice-witnesses, Conforti and Barry Lipsy. Recently, in DAVIS v.

ALASKA, --- U.S. --- , 39 L.Ed. 347 (February 27th, 1974), the United States Supreme Court, in a seven-two opinion delivered by Chief Justice Berger, reiterated the importance of "effective cross-examination for bias of an adverse witness." The Supreme Court held that effective cross-examination for bias was "so vital a constitutional right" that it must be deemed "paramount" even to the state's legitimate "policy of protecting a juvenile offender [against exposure of his record]." Id. at 355, 356. With regard to the witness, Lipsy, it is submitted that full and effective cross-examination was paramount to the prejudice which may have resulted against the Appellant Pacelli. The most appropriate course of conduct in this regard was to grant a severance from Pacelli's case in order that cross-examination on this rather extraordinary conduct could be fully explored.

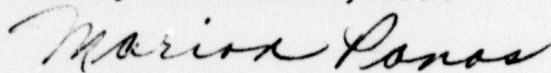
6. Your deponent certifies that this application for a stay of the mandate and the accompanying Petition for a rehearing are presented in good faith and not for the purpose of delay.

WHEREFORE, it is respectfully requested that, in the event that Appellants' Petition for a rehearing and

hearing in banc is denied, that Appellant's Motion for a stay of the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be granted in all respects.


GERALD L. SHARGEL

Sworn to before me this
4th day of October, 1974



MARION PANOS
Commissioner of Deeds, City of New York
No. 4-1629
Cert. filed in New York County
Commission Expires September 1, 1976

Service of ^{two (2)} ~~three (3)~~ copies of the within
petition for rehearing is hereby admitted
this *7th* day of *October*, 1974

.....
Attorney(s) for

